In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1488

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of having assaulted or intimidated a federal agent in the performance of his official duties, in violation of 18 U.S.C. 111. He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. B).

The evidence showed that on September 30, 1966, an FBI agent approached Joseph Marcello, Jr., petitioner's brother, in the lobby of a New York City

hotel and asked him whether he and his brother were returning to New Orleans that evening.[1] The lawyer for the Marcello brothers, to whom the question was referred, told the agent the flight number of the plane the brothers were taking to New Orleans that evening (R. 1172-1174).[2] The same day two other FBI agents, Patrick Collins and Joseph Avignone, were assigned to be present at the New Orleans airport to observe and photograph the deplaning of petitioner and his brother in order to determine who met them at the airport. Agent Avignone was to carry a movie camera and agent Collins was assigned to accompany him (R. 837-839, 931-932). Two police officers were also assigned by the New Orleans police force to observe petitioner's arrival from New York (R. 1021-1022, 1040-1041). In addition, newspaper and television photographers and a television reporter were present either to take pictures of petitioner's return or to interview him (R. 916-917, 1079-1081, 1290).[3]

Between 9:00 and 9:30 p.m., the plane carrying petitioner and his brother arrived in New Orleans (R. 917). When the brothers exited to the corridor leading to the main airport lobby the photographers, including FBI agent Avignone, began taking pictures and continued the picture taking in the lobby (R. 841, 918-919). In the lobby, the Marcello brothers

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[1] Petitioner was in New York to testify before a grand jury. *United States* v. *Marcello*, 280 F. Supp. 510, 515 (E.D. La.).

[2] Petitioner says this information was given to the agent with his approval (Pet. 7).

[3] Some of the media personnel knew that Collins and Avignone were FBI agents (R. 877, 922, 1293).

were met by petitioner's son (R. 920). FBI agent Collins walked behind the Marcello brothers and the photographers (R. 934).

The Marcello party and the photographers went out the front door of the airport terminal building to the adjacent upper automobile ramp. As the Marcello party was walking to their automobile, petitioner turned and advanced toward the photographers (R. 842-844). One of the Marcellos yelled "haven't you got enough pictures" and uttered an obscenity (R. 921, 935-937, 1026-1031, 1081). Petitioner approached agent Avignone, who was standing near a protective railing overlooking an automobile drive area some 25 to 30 feet below (R. 843). Agent Collins moved forward to intercede, if necessary, on behalf of agent Avignone. Petitioner looked at Collins, said "I'm the boss here" and asked Collins if he were looking for trouble (R. 846). Collins, who also was close to the railing, replied that he could handle trouble. Petitioner then jabbed at Collins, making some body contact (R. 846, 939-940, 944).[4] Petitioner was restrained by his brother and son and by an airport policeman who came on the scene. The Marcello party then entered their automobile and departed (R. 853, 1035).

In urging that the petition for a writ of certiorari should be denied, we rely in the main on the thorough opinion of the court below (Pet. App. B 1-39). The single contention advanced here to which we deem it

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[4] At this point, witnesses at the scene were apprehensive that someone would go over the railing (R. 1081, 1087-1088, 1134, 1294, 1302-1303).

appropriate to respond is the claim of double jeopardy (Pet. 15-18).

The indictment alleged that petitioner did "forcibly assault and intimidate" the federal agent in the performance of his official duties. At a first trial, the judge's instructions dealt only with the meaning of "assault" and omitted any reference to the intimidation branch of the statute and indictment (R. 672-679). After retiring for its deliberations, the jury sent in a note asking the court again to explain the definition of "assault and intimidate." The trial judge charged that, although the indictment used the term "intimidate" as well as "assault," the government need not prove that the defendant did both. The court then stated (R. 687-688):

> As I understand the Government's case, and the evidence which was offered, the evidence was not directed at showing that there was any intimidation of Mr. Collins, but rather that there was an assault.
>
> So I think for practical purposes you may forget the part "and intimidate" and consider the indictment as though the charges were only as to assault.

The jury thereafter was unable to agree on a verdict and a mistrial was declared (R. 692).

At the instant trial before a different judge, defense counsel, prior to the court's instructions, objected to the submission to the jury of both aspects of the indictment (assault and intimidate). The objection was not based upon the theory of collateral

estoppel asserted here,[5] but on the assertion that, in the circumstances of this case, there was no distinction between the two charges and therefore the government should elect which aspect it wished submitted (R. 1284-1285, 1324-1326; see Pet. App. B 37). The trial judge denied the motion, finding there was a legal distinction between "assault" and "intimidate" in that the latter did not require proof of an apparent present ability to commit bodily harm; in this case the defendant's statements "I'm the boss of this town," followed almost immediately by the inquiry "Are you looking for trouble?", in the context in which made, were sufficient to warrant a finding of intimidation (R. 1327-1328).[6] Subsequently, the court instructed on both aspects of the indictment (R. 1401-1402) and the jury returned a general verdict of guilty.

Petitioner contends here that the trial judge's statement at the first trial quoted above (p. 4, *supra*) amounted to a directed verdict of acquittal as to "intimidation" which constitutionally precluded the government from again raising and arguing "intimidation" at the second trial under the doctrine of collateral estoppel. See *Sealfon* v. *United States*, 332 U.S. 575; *Ashe* v. *Swenson*, No. 57, O.T., 1969, decided April 5, 1970, where the Court stated, slip op., p. 7:

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[5] This claim was first raised by defense counsel in the court of appeals.

[6] The court of appeals expressly affirmed this decision in its opinion (Pet. App. B 37).

> "Collateral estoppel" * * * means simply that when an issue of ultimate fact has once been determined *by a valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit. * * * [Emphasis added.]

We cannot agree that the judge's statement at the first trial constituted a "final judgment" determining "an issue of ultimate fact" as to the intimidation aspect of the indictment. The only "judgment" at the first trial was the order declaring a mistrial. And the judge could not have entered a judgment with respect to intimidation as distinct from assault, since they are not separate offenses under the statute but merely different methods of committing the same offense, which was charged in a single count against petitioner.[7] There is no principle that binds the government, following a mistrial, to present its evidence verbatim as it was presented at the first trial, or that requires the trial judge to repeat verbatim the instructions given at the first trial.

Moreover, petitioner never raised this issue at trial. Indeed, defense counsel's motion at the second trial (which was denied) to require the government to

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[7] The court of appeals, in its discussion of "Election" (Pet. App. B 37), states that assault and intimidation are two different offenses. The court, which was dealing with petitioner's argument that assault and intimidation mean the same thing, properly held that they did not. It did not, we believe, mean to decide that petitioner could have been separately convicted and separately punished for both assault and intimidation.

elect between "assault" and "intimidate" indicates clearly that petitioner did not then view the government as being collaterally estopped from raising the issue of "intimidation". Accordingly, he cannot now, as an afterthought, be permitted to set aside his conviction on this tenuous basis.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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